United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 19, 2007

TO : Rosemary Pye, Regional Director

Region 1

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Cardi Corp.

Case 1-CA-42494 177-2414-0100

460-5067-0700 530-6067-4001

530-6067-4055-6300

This case was resubmitted for advice as to whether to proceed with the complaint authorized by our October 31, 2005 Advice memorandum. We concluded there that Respondent Cardi Corp. violated Section 8(a)(5)/8(d) by unilaterally implementing without bargaining pre-employment drug and alcohol testing of referents from Charging Party Carpenters Local 94's non-exclusive hiring hall. Because the changed evidence as it now stands no longer supports the theory of complaint, the Region should withdraw the outstanding complaint and dismiss the charge, absent withdrawal.

Our original theory of complaint was predicated upon evidence that the Union's non-exclusive hiring hall functioned in a manner substantially similar to an exclusive hiring hall, and thus that Employer rules governing referral - including drug testing - constituted mandatory terms and conditions of bargaining just as at an exclusive hall. In general, referents from an exclusive hall are dispatched to intermittent, temporary, or transitory jobs, interspersed with periods as unemployed hiring hall registrants. Because the hall affords them a reasonable expectation of employment and reemployment with bargaining unit employers, registrants of an exclusive hall remain in the bargaining unit while out of work and on the union's hiring register. Such registrants are clearly and directly affected by

^{1 2005} Advice memorandum at 5-8.

 $^{^2}$ <u>Id</u>. at 5.

referral rules imposed by a bargaining unit employer that impact this cycle of employment, layoff and reemployment, including, we argued, mandatory drug and alcohol testing. 3

Although Respondent Cardi Corp. unilaterally subjected drug testing to referents from the Union's non-exclusive hiring hall, the evidence gleaned from the initial investigation indicated that, in practice, the hall functioned in a substantially similar manner to an exclusive hall. The evidence established that, as in a typical exclusive hiring hall arrangement, the Union's out-of-work list consisted of a group of bargaining unit employees who regularly used the hiring hall's service and were regularly dispatched and redispatched upon layoff to one of many unit employers. The initial investigation indicated that over a sampling of eight months during a representative time period, the Union dispatched approximately 263 referents to unit employers from a pool of about 840 registrants at the hall. Thus, in most months, the hall found jobs for about 25%-40% of the total number of hiring hall registrants. 4 Although the figures fluctuated monthly, the touchstone was that a significant number of registrants could expect to be dispatched and routinely redispatched upon layoff to a bargaining unit employer within a reasonable amount of time after they put their name back on the out-of-work register. Since these referents' expectation of employment and reemployment appeared to be significantly similar to the expectation of a referent from an exclusive hall, we concluded that referral rules (including drug testing by an employer) applicable to this non-exclusive hall, were, under the circumstances, mandatory subjects of bargaining just like the referral rules at an exclusive hall.

However, pre-trial investigation revealed that many of the factual predicates to our analysis reported from the initial investigation were in fact erroneous. First, the number of referrals to bargaining unit employers is substantially smaller than originally indicated. The Union hall dispatches referents to employers signatory to either of two

³ <u>Id</u>. at 6, citing <u>Houston Chapter</u>, <u>Associated General Contractors</u>, 143 NLRB 409, 412 (1963), enfd. 349 F.2d 449 (5th Cir. 1965), cert. den. 382 U.S. 1026 (1966).

 $^{^4}$ See 2005 Advice memorandum at p. 1 n.1 and p. 7.

collective bargaining agreements administered by the hall, not just one. The contract to which Cardi is signatory, the Heavy and Highway Agreement, is substantially the smaller of the two. Moreover, nearly two-thirds of all referrals between 2004 and 2006 under the Heavy & Highway Agreement were to employers who were not part of the bargaining unit, either because they were "me-too" signatories or because they had contractual obligations to other Carpenters locals that required them to use the Charging Party's hall for work within Local 94's jurisdiction. Thus, the Region has concluded that there are only two employers of bargaining unit employees under the Heavy & Highway Agreement, Cardi and Aetna Bridge Co. Rather than 263 referrals to bargaining unit employers over eight representative months, the evidence now indicates that the hall referred only 45 employees to bargaining unit employers in the three years between 2004 and 2006.

Second, registrants apparently do not regularly rely on the hall to place them back to work after they are laid off. Rather, current evidence indicates that such an event is relatively rare. Instead of evidence that the hall obtains bargaining unit positions for about 25%-40% of the total number of first-time and laid-off out-of-work registrants each month, the Region can substantiate only three occasions within a three year period where a hiring hall registrant has returned his or her name to the Union out-of-work list and subsequently been dispatched back to a bargaining unit employer. Rather than relying on the hall, bargaining unit employees apparently either stay on their employer's payroll throughout the year; are reinstated directly by a Cardi or Aetna supervisor; or obtain employment with employers outside the bargaining unit.

We thus conclude that the evidence as it now stands is insufficient to establish a requisite element of the theory of complaint, that this non-exclusive hiring hall functions like an exclusive hall. Although some registrants apparently use the hall to find work with a bargaining unit employer, they generally do not return to the hall for reemployment with a bargaining unit employer upon layoff. Thus, the changed evidence no longer establishes that the hiring hall provides registrants with a reasonable expectation of employment and reemployment with a bargaining unit employer sufficient to keep them in the bargaining unit upon layoff. We therefore cannot conclude that the referral rules, including drug and alcohol testing, constitute

mandatory subjects of bargaining as at an exclusive hall. Consequently, the Region should withdraw the outstanding complaint and dismiss the charge, absent withdrawal.

B.J.K.